

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

PATRICIA CHENEY,

Plaintiff,

v.

EMMAUS, INC.,

Defendant.

CIVIL ACTION NO. 04-11627 RGS

**DEFENDANT’S MOTION TO DISMISS PURSUANT TO
FED. R. CIV. P. 12(b)(1) AND 12(b)(6)**

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendant Emmaus, Inc. (“Emmaus”) moves to dismiss, with prejudice, Plaintiff’s claim in Count I of her Complaint for discrimination in violation of the Americans With Disabilities Act of 1990 (the “ADA”).¹ As grounds therefore, Defendant states the following:

1. Plaintiff’s ADA claim must be dismissed due to her failure to bring this action within 90 days of receipt of her Notice of Right to Sue from the Equal Employment Opportunity Commission;
2. The doctrine of equitable tolling should not be invoked on Plaintiff’s behalf to save her untimely claim as she was aware of the time limitation and did not pursue her claim diligently; and
3. Plaintiff’s claim must be dismissed due to her failure to exhaust administrative remedies prior to filing her Complaint with this Court.

¹ Plaintiff voluntarily dismissed her claim for a violation of the Family and Medical Leave Act of 1993 (the “FMLA”) with a Notice of Dismissal filed with this Court on September 3, 2004. As such, Defendant has not addressed this claim in the instant Motion. To the extent that Plaintiff withdraws her voluntary dismissal, Defendant reserves the right to address the merits of Plaintiff’s FMLA claim in a future motion to dismiss.

There are no facts in dispute that will bear on this Court's ability to adjudicate this motion. Further, by disposing of Plaintiff's only remaining claim against Emmaus, this action will be dismissed in its entirety.

For each of the foregoing reasons, as set forth more fully in Defendant's Memorandum of Law in Support of Its Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendant respectfully requests that the Court dismiss Count I of Plaintiff's Complaint, her claim for discrimination in violation of the ADA, and award Defendant its costs and attorneys' fees and such other relief as the Court deems appropriate. For the Court's convenience, a Proposed Order is attached hereto as Exhibit A.

Respectfully submitted,

EMMAUS, INC.,

By its attorneys,

/s Christine B. Watts

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Dated: September 7, 2004
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